(21)

No. 96-1581

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA, PETITIONER

v.

YANKTON SIOUX TRIBE AND DARRELL E. DRAPEAU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the boundaries of the Yankton Sioux Indian Reservation, as set forth in the 1858 Treaty between the Tribe and the United States, were diminished by the 1894 Act of Congress that ratified the Tribe's agreement to sell surplus reservation lands to the United States while expressly preserving the "full force and effect" of the 1858 Treaty.

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INTEREST OF THE UNITED STATES

This case concerns the boundaries of the Yankton Sioux Indian Reservation. Those boundaries affect the United States' law enforcement authority under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. In addition, the United States, because of its special relationship with the Indian Tribes, has a strong interest in protecting the integrity of reservation boundaries and in promoting tribal self-government within those boundaries.

STATEMENT

1. a. In the Treaty of April 19, 1858, 11 Stat. 743 (the 1858 Treaty), the Yankton Sioux Tribe ceded to the United States its aboriginal lands, about 11 million acres, except for a 430,000-acre Reservation in Charles Mix County in southeastern South Dakota. Art. 1 (Pet. App. 100). The Treaty specifically delineated the boundaries of the Res-

ervation, which was said to consist of "four hundred thousand acres." *Ibid.*[1] In return, the United States agreed, among other things, "[t]o protect the * * * Yanctons in the quiet and peaceable possession of the said tract * * * so reserved for their future home." Art. 4 (Pet. App. 102). The Treaty further provided that "[n]o white person," with some exceptions, "shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians." Art. 10 (Pet. App. 108).

b. Toward the end of the 19th century, Congress began to question the policy, reflected in the 1858 Treaty, of setting aside large tracts of land as permanent homes for Indian Tribes. See *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *DeCoteau* v. *District County Court*, 420 U.S. 425, 431 (1975). Congress was faced at that time with a "continuing demand for new lands for the waves of homesteaders moving west," *Solem*, 465 U.S. at 466, but was constrained by treaty provisions that, like Article 10 of the 1858 Treaty, prohibited white settlement on Indian reservations. In addition, Congress believed that the Indians would benefit from "assimilation into American society," which would be accelerated by their "abandon[ing] their nomadic lives on the communal reservations and settl[ing] into an agrarian economy on privately owned parcels of land." *Ibid.*

In response to those concerns, Congress passed the General Allotment Act, commonly known as the Dawes Act, in 1887. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. The Dawes Act "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432. As this Court has

[1] A subsequent survey determined that the Reservation actually encompassed some 430,000 acres. See Pet. App. 69.

recognized, while the elimination of Indian reservations may have been Congress's ultimate goal, the actual consequence of allotment was often "to continue the reservation system," at least for the time being. *Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973).

c. By 1892, much of the Yankton Sioux Reservation had been allotted to individual members of the Tribe pursuant to the Dawes Act. Pet. App. 71. In that year, Congress appropriated funds for the Secretary of the Interior "to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress." Act of July 13, 1892, ch. 164, § 1, 27 Stat. 137. The Secretary appointed three commissioners to conduct such negotiations with the Yankton Sioux. Pet. App. 71.

The Commissioner of Indian Affairs in the Department of the Interior instructed the commissioners to attempt to acquire all, or at least some portion, of the Tribe's surplus lands on terms that "should be just and equitable to the Indians as well as the United States." J.A. 99. The commissioners were provided with a form of agreement as "an indication of the views" of the Office of Indian Affairs, but were "not required to adhere to [it] absolutely." J.A. 101 (emphasis omitted).

In an agreement dated December 31, 1892 (the 1892 Agreement), the Tribe ceded to the United States, for $600,000, all of its surplus lands. Arts. I & II (Pet. App. 112-113). As the commissioners noted in their report to the Secretary of the Interior, those lands were "not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians." J.A. 137.[2] The Agree-

[2] The form agreement, which we have lodged with the Clerk of the Court, did not propose to pay the Tribe a sum certain for its lands. Instead, the lands were to be appraised and offered for sale in 160-acre parcels at no less than a specified price per acre. The provision paying

ment reserved from sale to settlers those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Art. VIII (Pet. App. 116).

The Agreement, unlike the Office of Indian Affairs form, contained a savings provision, which expressly preserved the Tribe's rights under the 1858 Treaty that created the Reservation:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Art. XVIII (Pet. App. 120).[3]

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the Tribe a flat $600,000 for the lands appears to have been adopted for administrative convenience. The commissioners explained that the appraisal option "would accomplish only about one-third of the work which the Government and the Indians desired to accomplish by this transaction," because only the most desirable land would have sold at or above the minimum price then agreeable to the Tribe. J.A. 136. It then "would have been necessary to enter into a new agreement with [the Tribe], reducing the minimum price" when the land failed to sell. *Ibid*.

[3] In addition, the Agreement contained a provision, insisted upon by the Tribe, prohibiting the selling or giving away of "intoxicating liquors" upon "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120).

d. Congress "accepted, ratified, and confirmed" the Agreement without change and incorporated it, together with several other surplus land agreements, into an omnibus Indian appropriations act (the 1894 Act). Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (Pet. App. 122). The congressional ratification debates raised various concerns about the Agreement, including whether the purchase price was too high and whether the Indians should be paid only when, or if, the lands were sold to settlers. J.A. 381-382, 403-427, 437-444. But there was no discussion of whether the Agreement, if ratified, would alter the boundaries of the Reservation.[4]

e. On May 16, 1895, President Cleveland issued a proclamation declaring that "all of the lands acquired from the Yankton tribe" by the 1892 Agreement, aside from those reserved for agency, school, and other purposes, were "open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement" and all applicable laws. J.A. 456. The proclamation incorporated a "Schedule of Lands within the Yankton Reservation, to be opened to settlement by Proclamation of the President." *Ibid.*

2. In 1993, the Southern Missouri Recycling and Waste Management District (the Waste District) purchased, from a non-Indian, a parcel of land within the original boundaries of the Yankton Sioux Reservation. Pet. App. 91. The Waste District sought to develop the land as a regional solid waste landfill. *Ibid.* After a hearing before the South Dakota Board of Minerals and Environment, at

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[4] The Act also included various implementing provisions. See Pet. App. 122-124. Those included a requirement that the sixteenth and thirty-sixth sections of each township on the opened lands be "reserved for common-school purposes" and be "subject to the laws of the State of South Dakota." *Id.* at 123.

which the Tribe opposed the landfill, the Waste District obtained a permit for the project. *Id.* at 91-92.

The Tribe then commenced this suit to enjoin construction of the landfill. Petitioner State of South Dakota was joined as a third-party defendant. Pet. App. 93. After trial, the district court concluded that "Congress did not disestablish or diminish the boundaries of the Yankton Sioux Reservation when it ratified the 1892 Agreement with the Yankton Sioux Tribe." *Id.* at 96.[5]

The court of appeals affirmed. Pet. App. 1-65. The majority acknowledged that the provisions in Articles I and II of the Agreement providing for cession of surplus lands in return for a fixed payment might, in other circumstances, indicate congressional intent to diminish a reservation. *Id.* at 14-15. However, the totality of the 1894 Act's text and legislative history—and, in particular, the savings provision of Article XVIII—did not, in the majority's view, establish that Congress intended to diminish the Reservation. *Id.* at 21, 27, 43-44. The dissent argued that the "cession" and "sum certain" language of Articles I and II alone provided sufficient evidence of diminishment. *Id.* at 44.

SUMMARY OF ARGUMENT

Under the Court's surplus land act jurisprudence, only Congress can diminish an Indian reservation. Its intent to do so must appear in the text of the statute itself or be clear from the surrounding circumstances. A congressional intent to diminish is not found lightly, and any ambiguities must be resolved in favor of the Indians.

The text of the 1894 Act, read in light of those principles, does not evince a clear congressional intent to diminish the Yankton Sioux Reservation. To be sure, the Act and the Agreement that it ratified contain language of cession and lump sum payment that, without more, has been held sufficient to establish such intent in other cases. But there *is* more in this case. The savings provision contained in Article XVIII of the Agreement, and incorporated by Congress into the Act, declares that "all provisions" of the 1858 Treaty are to remain "in full force and effect." Article XVIII thus preserves the first Article of the Treaty, which sets forth the boundaries of the Reservation. At a minimum, the savings provision manifests sufficient ambiguity as to Congress's intent regarding the reservation boundaries that the matter must be resolved in favor of the Tribe. That conclusion is reinforced by the provisions of the Agreement and the Act that reserve from sale to settlers those surplus lands occupied by the United States for agency, school, and other purposes; that reserve (but do not grant to the State) township sections for school purposes; and that prohibit the introduction of liquor onto the ceded lands or "any other lands within or comprising" the Reservation as delineated in the 1858 Treaty.

Nor do the course of negotiations with the Tribe, the debates on the 1894 Act, and other surrounding events provide the "unequivocal[]" evidence necessary to demonstrate "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem* v. *Bartlett*, 465 U.S. 463, 471 (1984). Petitioner concedes as much. Pet. Br. 28-29. And tribal members have remained, to this day, a substantial portion of the population within the original reservation boundaries.

Finally, the subsequent treatment of the reservation lands has been "rife with contradictions and inconsistencies." *Solem*, 465 U.S. at 478. However, on two occasions, in 1913 and 1941, when the federal government considered

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[5] At the same time, the district court found that the Tribe had not demonstrated that it had regulatory authority over the landfill project. Pet. App. 96. The Tribe did not appeal that ruling. *Id.* at 6 n.5.

the issue, it concluded that the Reservation was not diminished. The Court should reach the same conclusion here.

ARGUMENT

THE YANKTON SIOUX INDIAN RESERVATION HAS NOT BEEN DIMINISHED

This Court has recognized that each case involving whether a surplus land act has altered Indian reservation boundaries is unique, because "[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). "[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not," but instead "simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 469, 470 (citations omitted); see *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977) ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.").[6]

In a series of modern decisions concerning the effects of turn-of-the-century surplus land acts, the Court has followed several "well-established legal principles" in assessing whether such an act has diminished a reservation. *Rosebud Sioux*, 430 U.S. at 586-587; see, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 410-411 (1994); *Solem*, 465 U.S. at 470-472; *Mattz* v. *Arnett*, 412 U.S. 481, 504-505 (1973). The "first and governing principle" is that, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks and ellipses omitted). Its intent to do so "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz*, 412 U.S. at 505. The "most probative evidence" of such intent is, of course, the actual language of the surplus land act. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 470.

Second, while events surrounding the passage of a surplus land act are relevant, they rarely are sufficient, in themselves, to establish that Congress intended to alter reservation boundaries if the act itself is silent or ambiguous. *Solem*, 465 U.S. at 471. It is only when such events "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation" that they can sustain an inference that "Congress shared the understanding that its action would diminish the reservation." *Ibid.*[7]

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[6] An Indian reservation does not imply total Indian or federal ownership or control of all of the lands within its boundaries. The term instead refers to the geographical area within which the Tribe's authority over its territory and its members is primary. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973). It also describes an area in which the federal government exercises criminal jurisdiction in matters affecting Indians, see 18 U.S.C. 1151, and in which the services of the Bureau of Indian Affairs are focused. Reservation status does not eliminate all jurisdiction of the State with regard to non-Indians, especially in their relations with other non-Indians. See, *e.g.*, *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404 (1997); *United States* v. *McBratney*, 104 U.S. 621 (1881).

[7] Moreover, the Court has been "careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Hagen*, 510 U.S. at 411. The latter shed far less light on the intent of the Congress that adopted the act.

Third, the diminishment of an Indian reservation "will not be lightly inferred." *Solem*, 465 U.S. at 470; accord *Hagen*, 510 U.S. at 411. Any ambiguities in the surplus land act, its legislative history, or the surrounding context are to be resolved "in favor of the Indians." *Ibid.*; *Rosebud Sioux*, 430 U.S. at 586 ("[D]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."). Accordingly, absent "substantial and compelling evidence of a congressional intention to diminish Indian lands," the Court has considered itself "bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472.

No such "substantial and compelling evidence" exists here. The text of the 1894 Act, the circumstances surrounding its enactment, and subsequent events do not demonstrate with the requisite clarity that Congress intended to diminish the Yankton Sioux Reservation.

A. The Savings Provision Of The 1892 Agreement And The 1894 Act Precludes Any Determination That Congress Clearly Intended To Diminish The Reservation

Nowhere in the 1894 Act, the underlying 1892 Agreement, or the records of the negotiations and congressional debates is there any express statement that the Reservation was to be "abolished," "discontinued," "vacated," or otherwise disestablished or diminished. Congress used such language in a number of contemporaneous statutes involving Indian reservations. See *Mattz*, 412 U.S. at 504 n.22 (citing such statutes). It chose not to do so here.

In the absence of such language, provisions in a surplus land act that accept a Tribe's "cession" of reservation lands in return for a sum certain, where unqualified by other provisions, have been held sufficient to create a

strong presumption that Congress intended to diminish a reservation. See *Solem*, 465 U.S. at 470-471; *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975). But no such inference is warranted in a case such as this one, in which the ceded lands were scattered over the reservation (see J.A. 137) and Congress, in the same surplus land act, imposed conditions on the transaction that reasonably may be read as preserving the existing reservation boundaries.

The savings provision in Article XVIII of the 1892 Agreement, which Congress incorporated verbatim into the 1894 Act, contains such conditions with respect to the Yankton Sioux Reservation. Article XVIII begins by expansively providing that "[n]othing in this agreement" —necessarily including the cession and lump sum payment provisions of Articles I and II—"shall be construed to abrogate the [1858] treaty." Pet. App. 120. It then further declares that, "after the signing of this agreement, and its ratification by Congress, all provisions of the [1858] treaty * * * shall be in full force and effect, the same as though this agreement had not been made." *Ibid.* No exception is made for the first Article of the 1858 Treaty, which created the Reservation and delineated its boundaries. *Id.* at 100; see also Treaty, Art. 4 (Pet. App. 103) (recognizing that the Reservation was to be the Tribe's "permanent" home). Nor is any exception made for the other provisions in the Treaty that contemplate tribal self-government within the reservation boundaries.[8]

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[8] For example, Article 11 of the Treaty recognizes the federal government's authority over "matters of dispute and difficulty between [the Tribe] and other Indians," and thus, by implication, the Tribe's authority over internal matters. Pet. App. 108-109. That same article contains the Tribe's agreement to assist in enforcing federal "treaties, laws, or regulations * * * within the limits of [the] reservation." *Id.* at 109. See *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (law enforcement authority over tribal members is an inherent aspect of tribal self-government).

Article XVIII is considerably broader than the savings provisions contained in most other Indian agreements. See Pet. App. 16-18 & n.12, 81 (contrasting language of other agreements). It differs significantly from the more common savings provisions that simply preserve "benefits" or rights created under earlier treaties or agreements "*not inconsistent* with the provisions of this agreement." *Rosebud Sioux*, 430 U.S. at 623 (Marshall, J., dissenting) (quoting Rosebud Sioux agreement, Act of Apr. 23, 1904, ch. 1484, § 1, Art. V, 33 Stat. 255) (emphasis added); see *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 760-761 (1985) (quoting similar savings provision).[9]

Petitioner offers three reasons why Article XVIII should not be read to rebut any presumption created by the cession and lump sum payment language of Articles I and II. Pet. Br. 20-28. None of those arguments has merit.

First, petitioner contends (Br. 21-22) that Article XVIII should be construed solely "to preserve the annuities due the Tribe under the Treaty of 1858." But Article XVIII concludes with a separate clause specifically providing that "the said Yankton Indians shall continue to receive their annuities under the [1858] treaty." Pet. App. 120. Petitioner's proposed construction would render superfluous all of the preceding language of Article XVIII, in contravention of the canon that "[s]tatutes must be inter-

[9] None of the other surplus land agreements ratified along with the 1892 Agreement contains a similar savings provision. The agreements with the Cour d'Alene, Alsea, and Yuma Indians contain no savings provision at all. See Act of Aug. 15, 1894, ch. 290, §§ 14-15, 17, 28 Stat. 322-326, 332-336. The agreement with the Nez Perce Indians contains a provision that preserves those portions of earlier treaties "not inconsistent with the provisions of this agreement." § 16, 28 Stat. 331. A brief amicus curiae has been filed by Lewis County, Idaho, arguing that the Nez Perce agreement diminished that Tribe's Reservation. That issue is not before the Court or, indeed, before any court at this time.

preted, if possible, to give each word some operative effect." *Walters* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997); see *United States* v. *Alaska*, 117 S. Ct. 1888, 1918 (1997) ("The Court will avoid an interpretation of a statute that renders some words altogether redundant.") (internal quotation marks omitted).[10]

Second, petitioner contends (Br. 23-24) that Article XVIII, aside from its annuity clause, should be disregarded because it is "ambiguous" or "inconsistent." Principally, petitioner argues that Article XVIII's preservation of "all provisions" of the 1858 Treaty is inconsistent with Articles I and II, because the 1858 Treaty gave the Tribe "possession" of all reservation lands whereas Articles I and II transfer possession of some of those lands to the United States. But the appropriate judicial response to tension between different provisions of the same statute is not to read one of those provisions out of the statute. This Court has stressed that "[s]tatutory construction is a holistic endeavor," which, "at a minimum, must account for a statute's full text." *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks omitted); see *Federal Power Comm'n* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949) ("If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole."). It is thus essential "to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section," *United States* v. *Menasche*, 358 U.S. 528, 538-539 (1955)

[10] Moreover, while the historical materials cited by petitioner (Br. 21-23) demonstrate that some members of the Tribe were concerned at the time of the 1892 negotiations with the preservation of their annuities, they do not suggest that Article XVIII was drafted solely to address those concerns.

(internal quotation marks omitted), as petitioner would do here.

The 1894 Act may readily be construed to give effect to Article XVIII as well as Articles I and II. As the court of appeals recognized, all three provisions may be reconciled by construing the Act as conveying certain real property within the Reservation to the United States, for subsequent sale to non-Indian settlers, while preserving "as much of [the 1858] treaty as possible." Pet. App. 20-21. In other words, the Agreement and the Act may reasonably be read as simply opening the surplus lands for settlement "within established reservation boundaries," *Solem*, 465 U.S. at 470, while preserving those boundaries and the Tribe's right of self-government within them. The Agreement thus modifies only that portion of Article 10 of the 1858 Treaty that excluded white settlers from the Reservation.

We submit that ours is the most plausible "holistic" construction of the Act. But even if petitioner's strained construction, which essentially reads Article XVIII out of the Act, were deemed equally plausible, our construction must prevail. At a minimum, Article XVIII renders the Act sufficiently ambiguous that the diminishment question must be resolved in favor of the Tribe. See *Hagen*, 510 U.S. at 411; *Rosebud Sioux*, 430 U.S. at 586.

Finally, petitioner notes (Br. 26-28) that the Court did not accord significance to savings provisions in holding against diminishment in *Solem* or in favor of diminishment in *DeCoteau*. But the Court's silence is hardly surprising, given that neither the parties to those cases nor the United States as amicus curiae based their arguments on any savings provision. Nor did they have reason to do so. The surplus land act at issue in *DeCoteau* did not even contain a savings provision. See 420 U.S. at 455-460 (reprinting agreement as ratified). And the savings provision in *Solem*'s surplus land act was weaker than the one here. See Act of May 29, 1908, ch. 218, § 9, 35 Stat. 464 ("nothing in this Act shall be construed to deprive the said Indians * * * of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act").[11] In any event, because each surplus land act case is *sui generis*, turning on the particular "language of the Act and the circumstances underlying its passage," *Solem*, 465 U.S. at 469, no conclusion could properly be drawn from the Court's failure to address a different savings provision in a different surplus land act passed under different circumstances.

B. Other Provisions Of The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

Other provisions of the 1892 Agreement and the 1894 Act reinforce the conclusion, drawn from the savings provision of Article XVIII, that Congress did not clearly manifest an intent to diminish or disestablish the Reservation.

1. *The "agency, schools, and other purposes" provision.* Article VIII of the Agreement reserved from sale to settlers those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Pet. App. 116. The Court viewed a virtually identical provision in *Solem* as "strongly suggest[ing]" that Congress did not intend to diminish the reservation,

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[11] Petitioner also notes (Br. 26-27) that the Court observed in *Montana* v. *United States*, 450 U.S. 544, 548 (1981), that a series of surplus land acts had "reduced" the Crow Reservation. Although not mentioned by the Court, two of those acts contained savings provisions. Act of Mar. 3, 1891, ch. 543, § 31, 26 Stat. 1042; Act of Apr. 11, 1882, ch. 74, § 1, 22 Stat. 43. However, given that the construction of the surplus land acts was not at issue in *Montana*, the Court's statement has no relevance here.

because "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened areas would remain part of the reservation." 465 U.S. at 474. The same is true here.

2. *The "school sections" provision.* The 1894 Act contains a provision (not contained in the underlying 1892 Agreement) excepting from sale to settlers "the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." Pet. App. 123. Petitioner notes that a provision in the surplus land act in *Rosebud Sioux*, which "grant[ed]" the sixteenth and thirty-sixth sections to South Dakota for common schools, was held to indicate diminishment. See 430 U.S. at 600-602. But the Court's rationale in *Rosebud Sioux* is inapplicable here.

As the Court noted in *Rosebud Sioux*, the enabling act admitting South Dakota to the Union provided that the sixteenth and thirty-sixth sections of each township "are hereby granted to [the] State[] for the support of common schools." 430 U.S. at 599 (quoting Act of Feb. 22, 1889, ch. 180, § 10, 25 Stat. 679). That act further provided, however, that when those sections were "embraced in permanent [Indian] reservations," they "shall not, at any time, be subject to the grants * * * until the reservation shall have been extinguished." *Id.* at 599-600 (quoting § 10, 25 Stat. 679). The Court relied primarily on the legislative history of the *Rosebud Sioux* surplus land act to conclude that its school sections provision was intended to implement the school sections provision of the enabling act, and thus that the surplus land act extinguished the reservation status of the land so as to trigger the grant in the enabling act. See *id.* at 600-601 (quoting statement in congressional reports that school sections provision "is in conformity with the guarantee given to the State of South

Dakota by Congress in the enabling act"). No such legislative history exists here.

Nor does the 1894 Act contain the express "grant" language of the *Rosebud Sioux* surplus land act that was held to have implemented the South Dakota enabling act. To the contrary, the 1894 Act simply "reserve[s]" the sixteenth and thirty-sixth sections from settlement without taking the further step of granting them to the State, as contemplated by the enabling act when an Indian reservation is extinguished. Indeed, if the school sections were granted to the State and the Reservation extinguished, there would have been no need for Congress to provide, as it did in the same clause of the 1894 Act, that those sections "shall * * * be subject to the laws of the State of South Dakota." Pet. App. 123. Accordingly, the most natural reading of the school sections provision is that it simply authorizes the State to operate common schools for Indian and non-Indian students on specified lands within the reservation boundaries. At the very least, petitioner errs in contending that the school sections provision affirmatively supports a finding of diminishment. See *DeCoteau*, 420 U.S. at 445-446 n.33 (discussing similar provision).

3. *The liquor prohibition.* The Agreement and the Act also contain a provision that "[n]o intoxicating liquors * * * shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120). Petitioner notes that the Court held that a liquor prohibition in the *Rosebud Sioux* surplus land act indicated diminishment of the reservation. See 430 U.S. at 613-614. The Court reasoned that Congress must have assumed that the opened lands would no longer be Indian country, and thereby

subject to the existing statute prohibiting liquor in Indian country, because otherwise the provision would have been mere surplusage.

There is, however, an equally plausible explanation for why Congress would have included such a provision in the 1894 Act without intending to diminish the Reservation. The term "Indian country," which was not statutorily defined in 1894, was understood to exclude all lands held by non-Indians, even if located within reservation boundaries. See *Solem*, 465 U.S. at 468.[12] It was thus uncertain whether such lands would continue to be covered by the general statute banning liquor in Indian country. Special provisions like that contained in the 1894 Act eliminated any such uncertainty.

It is noteworthy as well that the liquor prohibition in the 1894 Act applies not to the opened lands alone, but to *all* lands within the original reservation boundaries, including lands held by the Tribe that indisputably would

[12] The term "Indian country," currently defined in 18 U.S.C. 1151, can be traced back to early statutes regulating Indian affairs. In the Indian Intercourse Act of 1834, Congress designated as Indian country all land west of the Mississippi River, not including Missouri, Louisiana, and the Arkansas Territory, and all land east of the Mississippi that was not part of any State, "to which the Indian title has not been extinguished." Ch. 161, § 1, 4 Stat. 729. Changing historical circumstances rendered that definition obsolete. In 1874, the compilers of the Revised Statutes omitted any statutory definition of Indian country, while leaving intact the numerous statutory provisions that used that term. From 1874 to 1948, the task of defining Indian country was left to the judiciary. In the early part of this century, the Court issued a series of decisions that form the basis for Section 1151. See 18 U.S.C. 1151 note. Thus, Section 1151 was, in part, an outgrowth of *Donnelly* v. *United States*, 228 U.S. 243 (1913), which eliminated the requirement that Indian country "be confined to land formerly held by the Indians, and to which their title remains unextinguished." *Id.* at 269. "Only in 1948," with the enactment of Section 1151, "did Congress uncouple reservation status from Indian ownership." *Solem*, 465 U.S. at 468.

remain subject to the general statute banning liquor in Indian country. Congress thus appears to have been concerned simply with adopting a clear, specific, and *permanent* ban on the selling or giving away of liquor anywhere within the Reservation.[13]

Significantly, moreover, because the Act prohibits liquor on "the lands by this agreement ceded and sold to the United States" as well as "any *other* lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty" (Pet. App. 120) (emphasis added), the Act appears to contemplate that the ceded lands would remain "within" the Reservation. The liquor provision in *Rosebud Sioux* contained no such description of the surplus lands as being within the reservation.

Petitioner apparently reads the liquor prohibition's reference to the 1858 Treaty as simply an identification of which lands were subject to the prohibition, not as an indication that all such lands would retain their reservation status. But that is not the most natural reading. It is further undermined by the background of the liquor prohibition, which was included in the 1892 Agreement only because the Tribe had "demand[ed]" it. J.A. 154-155.[14] The commissioners explained that the Tribe had made it an "imperative condition" of the sale of its surplus lands "that whisky should be excluded," because the Tribe "fear[ed] that upon the opening of the Yankton Reserva-

[13] The 25-year liquor prohibition in *Rosebud Sioux* similarly applied to "lands allotted" and "those retained or reserved," as well as to "the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of." Act of May 30, 1910, ch. 260, § 10, 36 Stat. 451.

[14] That was not the case with the liquor prohibition included 16 years later in the *Rosebud Sioux* surplus land act. See 430 U.S. at 611 (provision recommended by Secretary of Interior).

tion to settlement by white people, drinking saloons would be established in their midst." J.A. 154. That account conveys a clear sense that the Tribe believed that the Reservation would retain its identity and Indian character. The commissioners endorsed the Tribe's condition in terms that reinforce that understanding: they expressed the "hope that Congress will fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants *within the limits of the reservation*." J.A. 154-155 (emphasis added).[15]

Thus, far from supporting a finding of congressional intent to diminish the Reservation, as petitioner asserts, the liquor prohibition, like the school sections provision, affirmatively supports a contrary finding. But even if the school sections and liquor provisions were the same as those in *Rosebud Sioux*, the Court has since made clear that such provisions are "suspect" as "independent evidence of a congressional intention to diminish." *Solem*, 465 U.S. at 475 n.18.

C. Events Surrounding The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

The events surrounding the negotiation of the 1892 Agreement and the adoption of the 1894 Act do not demonstrate the requisite clear intent to diminish the Yankton Sioux Reservation. *Mattz*, 412 U.S. at 505. Indeed, petitioner essentially concedes (Br. 28) that such intent could not be established based on contemporaneous events alone.

1. *The 1892 negotiations.* The record of the negotiations with the Yankton Sioux contains none of the sorts of

[15] Congress responded by including penalties for the introduction of liquor "upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the [1858] treaty." Pet. App. 124.

statements by federal negotiators or tribal members that, in other cases, have been found to reflect a widely held understanding that a reservation was to be diminished. In *Rosebud Sioux*, for example, the Court noted the federal negotiator's statement to the Tribe that its cession of certain lands "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 430 U.S. at 591-592. Similarly, the Court noted in *Hagen* that the federal negotiator had informed the Tribe that "after next year there will be no outside boundary line to this reservation." 510 U.S. at 417. And in *DeCoteau*, the Court noted a tribal spokesman's acknowledgment that the reservation "was given us as a permanent home, but now we have decided to sell." 420 U.S. at 436-437 n.16.

No similar understanding that the Yankton Sioux Reservation was to be diminished can be discerned from the statements cited by petitioner. See Pet. Br. 29-30. Commissioner Cole's assertions that "[t]he reservation alone proclaims the old time and the old conditions," and that "[t]he tide of civilization * * * requires the sale of these surplus lands and the opening of this reservation to white settlement," are fully consistent with an intent to open surplus lands to non-Indian settlement within existing reservation boundaries. Commissioner Brown's statement that "[t]he time is past when you could stay in your present condition" likewise does not suggest any immediate extinguishment of the Reservation. He may simply have been expressing the view that the Tribe must have greater contact with non-Indian society in order to achieve the goal of self-sufficiency contemplated by the 1858 Treaty. Nor does the recognition by the commissioners and tribal members that the Agreement would effect a "sale" of surplus lands (see Pet. Br. 29) suggest any

understanding that the reservation boundaries would thereby be altered.

Other contemporaneous statements suggest, if anything, that the commissioners and the Tribe did *not* understand that the Reservation would be diminished. In their final report to the Secretary of the Interior, for example, the commissioners observed that the Agreement would bring about "[t]he settlement *of the reservation* by white people." J.A. 150 (emphasis added). And in a letter to one of the commissioners shortly after the Agreement was signed, Reverend Williamson, a missionary who was well-regarded among the Yankton Sioux, found "no cause of apprehension that this agreement will *in any way* interfere with the treaty of 1858." J.A. 317-318 (emphasis added).

2. *The congressional debates.* The congressional debates on the 1894 Act fail to demonstrate any intent to diminish the Reservation. The discussions focused primarily on the fiscal consequences of the government's agreeing to pay a sum certain for the surplus land at the outset rather than to pay only when, or if, the land was sold to settlers. See J.A. 406-427, 437-444. As Representative Pickler of South Dakota, a member of the Indian Affairs Committee and a supporter of the Agreement, stated during the House debates:

> The only question is whether we will settle up with the Indians now or keep books with them and pay them hereafter as the lands are sold, supposing they would so agree.

J.A. 427; see J.A. 432 (Rep. Maddox, an opponent of ratification, agrees that "[t]he question is whether we are willing to advance the money"). Nothing in the record indicates that Congress believed that the answer to that question would affect the future boundaries of the Reservation. See Pet. App. 15-16 ("the House debate" and

other contemporaneous statements "all show that a sum certain price was included for reasons other than issues of jurisdiction and sovereignty").

Petitioner identifies no statement during the congressional debates that expressly addresses the status of the reservation boundaries. Instead, petitioner relies (Br. 31-32) on statements by two Representatives that the opened lands would become part of the "public domain." See J.A. 380, 386 (Reps. McRae and Hermann). However, isolated floor statements referring to the "public domain," especially when no such references appear in the text of the Act itself, shed little light on the diminishment question. See *Solem*, 465 U.S. at 475 & n.17; see also *Hagen*, 510 U.S. at 413.[16]

3. *The Presidential proclamation.* The post-enactment proclamation of the President opening the surplus lands for settlement also indicates that those lands were to remain within the Reservation. The proclamation refers to, and incorporates by reference, a "Schedule of Lands *within the Yankton Reservation*, South Dakota, to be opened to settlement by Proclamation of the President." J.A. 456 (emphasis added). The proclamation further states that the lands were being opened "under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in [the 1892] agreement." *Ibid.* Those "restrictions" and "reservations" necessarily included the Article XVIII savings provision preserving the "full force and effect" of the 1858 Treaty establishing the Reservation.

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[16] Moreover, another member of Congress expressed the view that the opened lands would "[n]ot necessarily" become a part of the "public domain" upon their purchase by the United States. J.A. 382-383 (statement of Rep. Lynch).

D. Subsequent Events Do Not Establish That The Reservation Was Diminished

The Court has recognized that evidence of the government's subsequent treatment of the lands opened by a surplus land act is of only limited value in assessing whether Congress intended to diminish a reservation. *Solem*, 465 U.S. at 471. It has never been found sufficient, in itself, to establish such an intent. Moreover, where the treatment of the opened lands has been "rife with contradictions and inconsistencies," such evidence is "of no help." *Id.* at 478; see also *Hagen*, 510 U.S. at 420.

The federal government's conduct with respect to the Yankton Sioux Reservation, while not entirely consistent, suggests that no diminishment was intended. Most significantly, on two occasions when the federal government squarely considered the question, it concluded that the Reservation was not diminished.

First, as early as 1913, in its brief in *Perrin* v. *United States*, 232 U.S. 478 (1914), the United States took the position that the Reservation had not been diminished. In arguing the validity of the liquor prohibition contained in Article XVII of the 1892 Agreement, the United States stated:

> And the "Reservation" referred to in Article I [of the Agreement] (as enduring then and after the passage of the act) was necessarily that embraced in the original boundaries of the 400,000 acres [under the 1858 Treaty].

U.S. Br. at 7-8, *Perrin* v. *United States*, No. 707 (O.T. 1913). In other words, the Reservation not only "endur[ed]" after the 1894 Act, but continued to encompass all of the lands within the 1858 Treaty boundaries. See also *id.* at 19-20 (describing ceded lands as within "actual physical boundaries of the reservation"). The petitioner

took the same position. See *Perrin* Transcript of Record at 28.

Second, in 1941, Felix Cohen, then-acting Solicitor of the Department of the Interior and author of the authoritative *Handbook of Federal Indian Law* (1942), issued a carefully considered opinion letter concluding that the boundaries of the Yankton Sioux Reservation had not been changed by the 1894 Act. See 1 U.S. Dep't of Interior, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs* 1063 (1979). His conclusion rested primarily on the fact that the 1894 Act, in contrast to other surplus land acts, provided for the allotment to tribal members of lands "scattered over all the reservation," rather than "ced[ing] a definite part of the reservation and treat[ing] the remaining area as a diminished reservation." *Id.* at 1064. Solicitor Cohen noted (*ibid.*) that events since the passage of the Act had not undermined his conclusion that the Reservation had not been diminished:

> Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation nor determination that the reservation no longer exists. On the contrary, the reservation was referred to as a still existing unit in the acts of April 29, 1920 (41 Stat. 1468), and June 11, 1932 (47 Stat. 300).[17]

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[17] Petitioner argues (Br. 42-44) that Acting Solicitor Cohen's opinion is inconsistent with opinions issued by other members of the same office. Those opinions, however, either assume diminishment without analysis (see J.A. 492) or were issued by a subordinate officer, an associate solicitor (see J.A. 518). See *Hagen*, 510 U.S. at 420 (rejecting reliance on "merely passing references" to diminishment). The Cohen opinion has never been retracted or superseded. The official position of the Department of Interior remains that the Reservation was not diminished.

We do not dispute that Congress, the Executive, and the federal courts may not always have been consistent in their statements with respect to the status of the Yankton Sioux Reservation. Congress, for example, has occasionally used the term "former" in its post-1894 references to the Reservation. See Pet. Br. 44. More often, however, it has not.[18] While federal officials have sometimes made statements indicating that the Reservation was diminished (see Pet. Br. 41-44), those statements appear to be "merely passing references," and "not deliberate expres-

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Nor is there any inconsistency, as petitioner suggests (Br. 43), between Felix Cohen's 1941 opinion and his 1942 citation of *Perrin* for the proposition that Congress has the authority to impose "liquor restrictions on lands ceded to [the United States] by the Indians when these lands adjoined Indian country." *Handbook of Federal Indian Law* 353 & n.26. As explained on the next page of that treatise, Cohen was relying on a definition of "Indian country" as "all lands and reservations, Indian title to which has not been extinguished." *Id.* at 354 n.32. Under such a definition, tribal lands purchased by the United States or non-Indian settlers would no longer be Indian country, whether or not within an existing reservation.

[18] See, *e.g.*, Act of Feb. 26, 1896, ch. 31, § 1, 29 Stat. 16 (one-year leave of absence for "settlers who made settlement under the homestead laws upon lands in the Yankton Indian Reservation"); Act of June 10, 1896, ch. 398, § 1, 29 Stat. 343 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1068 (authorizing use of "land reserved for agency purposes on the Yankton Indian Reservation" as tribal park); Act of June 21, 1906, ch. 3504, 34 Stat. 371 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167 (restoration to Tribe of "lands on the Yankton Sioux Indian Reservation * * * now reserved for agency, schools, and other purposes"); Act of July 6, 1954, ch. 463, 68 Stat. 452 (preamble) (authorizing funds for removal and resettlement of "the Indians of the Yankton Indian Reservation" residing on lands taken for water project).

sions of * * * conclusions about congressional intent in [1894]." *Hagen*, 510 U.S. at 420.[19]

Similarly, the federal cases on which petitioner relies (Br. 33-34) neither turned on the diminishment question nor presented any extended analysis of that question. For example, while petitioner asserts (Br. 33) that the diminishment analysis in this case is "controlled" by *Perrin*, the Court had no occasion in that case to decide whether the reservation boundaries had been diminished. The case concerned whether Congress had exceeded its authority in prohibiting liquor sales on lands opened by the 1894 Act. 232 U.S. at 483. The Court concluded that it had not. *Id.* at 485. Accordingly, since the Court did not hold that Congress's authority to prohibit liquor was limited to

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[19] For example, petitioner notes (Br. 38, 44) the United States' statement 12 years ago in a footnote in a brief that, based on decisions of state courts in South Dakota, the Reservation had been diminished by the 1894 Act. See U.S. Br. at 17 n.10, *United States* v. *Dion*, 752 F.2d 1261 (8th Cir. 1985) (en banc). The boundaries of the Reservation were, however, immaterial to the issue in that case, which instead concerned whether the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, abrogated the Tribe's rights to hunt bald or golden eagles. The court of appeals did not make any determinations regarding reservation boundaries, since the violations had occurred on trust lands, and left unresolved whether the conduct at issue had "occurred on the Yankton Sioux Reservation." 752 F.2d at 1270. Indeed, the defendant tribal members in *Dion* maintained that their conduct had occurred on the "Yankton Sioux Reservation," thereby asserting its continued existence. *Id.* at 1263.

Petitioner also points (Br. 44) to a Federal Register notice in which the Environmental Protection Agency expressed its "belie[f]" that "the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was disestablished by the Act of 1894." Yet, the very title of that notice—"Notice of *tentative* determination"— indicates that it should not be accorded significant weight. 59 Fed. Reg. 16,647, 16,649 (1994) (emphasis added). In any event, as petitioner acknowledges (Br. 44), EPA has since rejected that tentative belief.

Indian reservations, the Court did not have to decide whether the ceded lands were, in fact, within the Reservation. The Court's description of the ceded lands as "formerly included in the Yankton Sioux Indian Reservation" (*id.* at 480) is merely a "passing reference" that does not indicate any analysis of the diminishment issue. See *Hagen*, 510 U.S. at 420.[20]

To be sure, the State has asserted jurisdiction over the opened lands on the Reservation. See Pet. App. 33, 38. As this Court has recognized, however, such an assertion of jurisdiction, while of "some evidentiary value," is not dispositive of Congress's intent. *Solem*, 465 U.S. at 471. That is particularly so where, as here, there is countervailing evidence from Congress and the Executive Branch.[21]

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[20] The subsequent federal cases cited by petitioner (Br. 34, 38) merely assumed diminishment, without any independent assessment, and did not turn on the resolution of that question. See, *e.g.*, *Cihak* v. *United States*, 232 F. 551 (8th Cir. 1916) (dicta) (application of Article XVII); *Forman* v. *United States*, 256 F.2d 766 (8th Cir. 1958) (dicta) (allotment claim); *Yankton Sioux Tribe* v. *United States*, 623 F.2d 159, 165 (Ct. Cl. 1980) (dicta) (land and trust fund claims related to 1894 Act); *Weddell* v. *Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980) (dicta) (dependent Indian community), cert. denied, 451 U.S. 941 (1981).

[21] Petitioner also cites (Br. 35-36) several opinions of the South Dakota Supreme Court that state that the Reservation was diminished. Some predate this Court's recent decisions clarifying the criteria for assessing diminishment. The rest simply rely, without further analysis, on the earlier opinions. See *State* v. *Williamson*, 211 N.W.2d 182, 183 (S.D. 1973) (analogizing 1892 Agreement to ordinary conveyance); *Wood* v. *Jameson*, 130 N.W.2d 95, 99 (S.D. 1964) (summarily holding that Reservation was diminished); *State* v. *Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) (citing *Williamson*); *State* v. *Thompson*, 355 N.W.2d 349, 350-351 (S.D. 1984) (citing *Williamson*); but see *Cournoyer* v. *Montana*, 512 N.W.2d 479, 479 (S.D. 1994) (referring to "physical confines of the Yankton Sioux Tribe reservation").

In sum, as the court of appeals observed, government entities' treatment of the Reservation has been "mixed." Pet. App. 35. At a minimum, then, one must conclude, as in *Solem*, that the evidence is too "rife with contradictions and inconsistencies" to establish that Congress intended to diminish the Reservation. 465 U.S. at 478.

E. Demographic Patterns Do Not Establish Diminishment

Petitioner relies (Br. 48-49) on demographic patterns as additional evidence of intent to diminish the Reservation. But "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act." *Solem*, 465 U.S. at 472. The Court has never held a reservation to have been diminished based on demographic factors alone.

To the extent that demographic evidence can shed any light on the intent of the Congress that adopted a surplus land act, the most probative evidence is from the years immediately after the adoption of the act. Here, such evidence is, as the court of appeals charitably put it, "somewhat incomplete." Pet. App. 41. The 1900 census did not separately identify the population within the boundaries of the Reservation as defined by the 1858 Treaty. It identified only the population of Charles Mix County, less than half of which falls within those boundaries. Those figures show that the County had 1,483 Indian residents and 7,015 non-Indian residents five years after the opening of the Reservation. Even assuming, as did the court of appeals, that the mix of Indians and non-Indians was the same throughout the County, Indians would still have constituted about 40 percent of the population within the original Reservation boundaries. *Ibid.*[22] This is not the

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[22] It is reasonable to assume that most Indians lived on the Reservation in 1900, rather than elsewhere in the County. Indeed, at the

sort of situation described in *Hagen* and *Solem*—"an area [that] is predominately populated by non-Indians with only a few surviving pockets of Indian allotments"—that would be probative of congressional intent to diminish a reservation. *Hagen*, 510 U.S. at 420-421; *Solem*, 465 U.S. at 471-472.

Even today, "between 32 and 44 percent of the people within the 1858 boundaries are Indians," depending on whether one uses 1990 census figures or the Tribe's own figures. Pet. App. 42. That is a significantly higher percentage than on the Lake Traverse Reservation, which the Court held to have been disestablished in *DeCoteau*, where Indians constituted only 9 percent of the population. See 420 U.S. at 428. And it is more than twice the percentage of Indians within the original reservation boundaries in *Hagen*. See 510 U.S. at 421. In short, the territory within the boundaries of the Yankton Sioux Reservation has not lost its "Indian character."

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time of the 1990 census, only eight of the 1,994 Indians in the County lived outside the Reservation. Pet. App. 42-43.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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